

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

**THE SUPREME COURT  
OF THE  
UNITED STATES**

CAPTION: UNITED STATES, Petitioner, v. GRAYDON EARL  
COMSTOCK, JR., ET AL.  
CASE NO: No. 08-1224  
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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 08-1224, United  
5 States v. Comstock.

6 General Kagan.

7 ORAL ARGUMENT OF GEN. ELENA KAGAN

8 ON BEHALF OF THE PETITIONER

9 GENERAL KAGAN: Mr. Chief Justice, and may  
10 it please the Court:

11 Article I of the Constitution permits  
12 Congress to enact section 4248, which is the limited  
13 Federal civil commitment statute at issue in this  
14 case.

15 To see why, to understand the basis for this  
16 statute, it might be helpful to go all the way back to  
17 1945, when what this Court later called "a  
18 conspicuously able committee of Federal judges"  
19 recommended that Congress pass section 4246, a very  
20 similar civil commitment law that has been on the  
21 books for some 60 years.

22 The committee there wrote that the law was  
23 necessary to deal with what it called the serious  
24 problem of what to do with insane criminals -- and I'm  
25 quoting now -- "upon the expiration of their terms of

1 confinement, where it would be dangerous to turn them  
2 loose upon society and where no State will assume  
3 responsibility for their custody."

4 That is exactly what Congress concluded  
5 here. Congress could reasonably find that section  
6 4248 was necessary to prevent a similar problem. The  
7 Federal Government has mentally ill, sexually  
8 dangerous persons in its custody. It knows that those  
9 persons, if released, will commit serious sexual  
10 offenses; and it knows too that States are often not  
11 in a position to deal with such dangers, not in a  
12 position to take custody and care and responsibility  
13 for those persons upon release from Federal prison.

14 This is essentially a transitional problem  
15 that the Court was -- that the Congress was dealing  
16 with, how to manage the transition from Federal  
17 custody to State superintendence and responsibility.

18 JUSTICE KENNEDY: Well, is part of the  
19 statutory scheme that you can be committed to Federal  
20 custody for, say, a year and then the State takes it  
21 over?

22 GENERAL KAGAN: That is correct, Justice  
23 Kennedy. In fact, what the statute requires is for  
24 the Attorney General really to -- immediately upon  
25 commitment, to go to a State, if he hasn't done so

1     beforehand -- to go to two States, the State of  
2     domicile and the State of prior conviction.

3             JUSTICE KENNEDY:   Why would a State want to  
4     incur that extra expense if --

5             GENERAL KAGAN:   Well --

6             JUSTICE KENNEDY:   -- if the Federal  
7     Government is going to do it for them?

8             GENERAL KAGAN:   What Congress found was that  
9     States often were not willing to incur that extra  
10    expense, even if the Federal Government was not going  
11    to do that for them, and what this legislation was,  
12    was a response to that reality.   It was --

13            JUSTICE GINSBURG:   What was the experience  
14    under 4246?   You pointed out that that has been on the  
15    books for some time, and there efforts must be made to  
16    have the State take the person.

17            When the civil commitment is used following  
18    the end of a term -- let's say someone is insane --  
19    how often does it end up that the State takes  
20    responsibility and how often is it that the person  
21    stays in Federal custody?

22            GENERAL KAGAN:   I think it is unusual,  
23    Justice Ginsburg.   It's not the usual course that the  
24    State does take responsibility.   But the Federal  
25    statute commits the Attorney General and the Bureau of

1 Prisons to try to persuade a State to take custody, to  
2 defer to the State if a State has some reason to take  
3 custody, but -- but make sure that the Federal  
4 Government is a kind of backstop, so that if the State  
5 does not take responsibility and does not take  
6 custody, the Federal Government will ensure that the  
7 person will not be released, the person who has been  
8 found to be both mentally ill and sexually --

9 JUSTICE GINSBURG: But the likelihood is  
10 that the person will stay in Federal custody?

11 GENERAL KAGAN: I think that that's fair,  
12 that the likelihood is that the person will stay in  
13 Federal custody until such time as a court finds that  
14 the reasons for that custody have lapsed. But, again,  
15 the State always has the ability to come in and say:  
16 We would like to take control over this person. And  
17 more to the point, the Attorney General has the  
18 responsibility to keep going to the State and to try  
19 to see if he can transfer custody to the State.

20 JUSTICE SCALIA: What -- what -- what power  
21 conferred upon the Federal Government by the  
22 Constitution permits the Federal Government to assure  
23 that sexual predators are not at large?

24 GENERAL KAGAN: I think the power,  
25 Justice Scalia, is the power to run a responsible

1 criminal justice system, to run a criminal justice  
2 system that does not itself endanger the public.

3 CHIEF JUSTICE ROBERTS: So you would say  
4 that the Federal Government has no such power  
5 independent of the criminal conviction? In other  
6 words, that Congress could not pass a law saying, just  
7 as this one says, we are going to commit people who  
8 are sexually dangerous until a determination that they  
9 are not or until the State can take them? That power  
10 would not be in Article I?

11 GENERAL KAGAN: Without the person having  
12 entered the criminal justice system in any way.

13 CHIEF JUSTICE ROBERTS: Right. I understand  
14 your argument to be that this power is necessary and  
15 proper, given the fact that the person is in Federal  
16 custody for some other reason, criminal conviction.

17 GENERAL KAGAN: That has been the  
18 government's case throughout this litigation, that it  
19 has always depended on the fact of Federal custody, on  
20 the fact that this person has entered the criminal  
21 justice system, has been -- four of the five of these  
22 people --

23 CHIEF JUSTICE ROBERTS: Yes.

24 GENERAL KAGAN: -- have been convicted and  
25 have served prison terms. And the question really is,



1 well, given that, given that the Federal Government  
2 has custody of these people, that it's difficult for  
3 the States to -- to take responsibility for these  
4 people after the prison term is finished.

5 CHIEF JUSTICE ROBERTS: Well, why doesn't  
6 the Federal Government's authority to have custody  
7 because of the criminal justice system end when the  
8 criminal justice system is exhausted? In other words,  
9 when the sentence is done?

10 GENERAL KAGAN: Because the Federal  
11 Government has a responsibility to ensure that release  
12 of the people it has in its custody is done  
13 responsibly, is done in such a way --

14 JUSTICE SCALIA: But you said no. I mean,  
15 there is no constitutional power on the part of the  
16 Federal Government to protect society from sexual  
17 predators. And, you know, once the Federal custody is  
18 at an end, it seems to me that's the only power you  
19 could be relying upon.

20 GENERAL KAGAN: I think that the power to  
21 run a responsible criminal justice system extends to  
22 the way in which the Federal Government releases these  
23 prisoners. And --

24 JUSTICE KENNEDY: Could the Federal  
25 Government order a commitment of anyone who's been in

1 Federal custody over the last 10 years?

2 GENERAL KAGAN: Justice Kennedy, I think  
3 that that would be a much harder case. There are some  
4 people, of course, who are on supervised release and,  
5 for example --

6 JUSTICE KENNEDY: No, no, no. That makes  
7 your -- my hypo too easy for you.

8 (Laughter.)

9 GENERAL KAGAN: Okay. Well, I'll grab your  
10 difficult hypo, then. And I would say that that would  
11 be a different case and that the Federal Government  
12 would not have the -- the power to commit a person who  
13 is -- has been released from prison and whose period  
14 of supervised release is also completed. At that  
15 point, the release has been -- the transfer to State  
16 responsibility and State control has occurred, and the  
17 Federal Government would have no appropriate role.

18 JUSTICE KENNEDY: So that must be because  
19 there is a lack of Federal power.

20 GENERAL KAGAN: Yes, I think that that's  
21 correct, that at that point the State police power  
22 over a person has been fully reestablished.

23 JUSTICE SCALIA: But it's fully  
24 reestablished once he walks out of Federal prison, at  
25 least if he walks out of Federal prison into a State.

1           GENERAL KAGAN: I think that that's not  
2 right, Justice Scalia. I think that there is a  
3 transition period, and what this statute is designed  
4 to do is to deal with that transition period and to  
5 make sure that sexually dangerous, mentally ill people  
6 don't fall through the cracks between Federal custody  
7 and the reestablishment of State control.

8           JUSTICE SCALIA: Well, but they don't fall  
9 through the cracks if the Federal Government notifies  
10 the State into which this prisoner is to be released:  
11 We are going to release a prisoner; we think he's  
12 sexually dangerous; you should take some action to be  
13 sure that he doesn't harm society. Because that's a  
14 State police function, it's none of our business.

15           GENERAL KAGAN: I think Congress could  
16 reasonably find that that is insufficient. Congress  
17 could reasonably find that the State -- that the  
18 relationship between the State and the individual has  
19 been sufficiently disrupted as a result of what is in  
20 many of these cases an extended period of Federal  
21 custody, that it's not so easy to establish --  
22 reestablish it all at once. And I would point to you  
23 as proof of this the supervised release system itself.

24           JUSTICE SOTOMAYOR: Under your theory --  
25 under the theory that you are proposing, then, any

1 dangerous person, whether it's because of mental  
2 illness or any other reason, could be held  
3 indefinitely --

4 GENERAL KAGAN: No --

5 JUSTICE SOTOMAYOR: -- under a civil  
6 commitment statute, because what you're saying is that  
7 the Federal Government, merely because of their --  
8 their tie in control of the individual, has an  
9 unlimited constitutional power to then civilly commit  
10 this dangerous person.

11 GENERAL KAGAN: I think what would prevent  
12 that, Justice Sotomayor, is the Due Process Clause.  
13 It is obviously the case that there are other  
14 constraints on governmental action than Article I.

15 JUSTICE SOTOMAYOR: Well, what -- what  
16 constrains the government under the Due Process Clause  
17 from invoking a dangerousness merely because someone  
18 has a long history. We have many criminal defendants  
19 with long histories of violent behavior. Many of them  
20 continue that violent behavior in prison, and some of  
21 them at the end of their term are let out, because  
22 their term has been completed. So what -- what in  
23 the Due Process Clause protects --

24 GENERAL KAGAN: Well, I think that the  
25 history of this Court's cases would suggest that if

1 this were a person without mental illness that the  
2 civil commitment statutes --

3 JUSTICE SOTOMAYOR: But that's where I'm  
4 trying to understand --

5 GENERAL KAGAN: Yes, that the civil --

6 JUSTICE SOTOMAYOR: -- the connection  
7 between the nature of the mental illness and the  
8 constitutional power that you are claiming. What --  
9 what is it that gives you that power?

10 GENERAL KAGAN: Well, if you go back to a  
11 case like Kansas v. Hendricks, which is of course  
12 where this Court thought about civil commitment  
13 statutes with relation to sexually dangerous  
14 offenders, I think the Court made clear that it was  
15 important in that case that there be not only sexual  
16 dangerousness, but also mental illness, in order to  
17 invoke the civil commitment statutes.

18 JUSTICE GINSBURG: Are you saying that as  
19 far as those limitations, the question Justice that  
20 Sotomayor was asking, the limitations on the Federal  
21 Government would be the same as they are on the  
22 States? But that's a different question from whether  
23 the Federal Government has any power at all.

24 GENERAL KAGAN: You said it better than I  
25 did, Justice Ginsburg. That's exactly right, that of

1 course there are constraints on the Federal Government  
2 in using civil commitment statutes, that they are the  
3 same as the -- the constitutional constraints on the  
4 States when they use that power. But this is a  
5 different question. The question presented here is  
6 only whether -- assuming that the Federal Government  
7 is acting within other constitutional constraints in  
8 making this civil commitment, whether Article I  
9 enables it to do so because of the special custodial  
10 role in these cases. And --

11 JUSTICE SCALIA: General Kagan, you are  
12 relying on the Necessary and Proper Clause, right?  
13 You say: But "necessary and proper" doesn't mean it's  
14 necessary and proper for the good of society. It  
15 means it's necessary and proper for the execution of  
16 another power that the Federal Government is given by  
17 the Constitution.

18 Now, why is this necessary for the execution  
19 of any Federal power? The Federal criminal proceeding  
20 has terminated. The individual is released. You  
21 could say it's necessary for the good of society, but  
22 that's not what the Federal Government is charged  
23 with. Why is it necessary to any function that the  
24 Federal Government is performing? It has completed  
25 its performance of the function of incarcerating this

1 individual until he has served his punishment.

2           GENERAL KAGAN: The Court has always said,  
3 Justice Scalia, that the Necessary and Proper Clause,  
4 the question is, is it necessary and proper to the  
5 beneficial exercise of Federal powers? And so this  
6 is, that it is necessary and proper to the beneficial  
7 or, what I said before, the responsible exercise of  
8 the Federal power to operate a criminal justice  
9 system, which includes the responsibility to ensure  
10 that those people who have been in custody in that  
11 Federal -- in that criminal justice system are not  
12 released irresponsibly.

13           JUSTICE ALITO: Isn't it the case that --

14           JUSTICE KENNEDY: But the brief -- excuse  
15 me.

16           JUSTICE ALITO: Well, I was going to ask, is  
17 it the case that the unwillingness of States to step  
18 into this area in these instances is a consequence, at  
19 least in part and perhaps in large part, of the  
20 Federal incarceration, that as a result of the Federal  
21 incarceration, the person is no longer viewed by the  
22 State as -- as having domicile within the State, the  
23 State of prior domicile has no way of knowing whether  
24 that person would return to a domicile in the prior  
25 State? Is that -- do you think that is a fair

1 understanding of the reason for the enactment of this?

2 GENERAL KAGAN: Just to make sure that I  
3 understand the question, that the reason for the  
4 enactment in part has to do with the fact that the  
5 Federal Government has assumed custodial  
6 responsibility and has disrupted the relationship  
7 between the State and the citizen, I think that that's  
8 exactly right, Justice Alito.

9 But in some sense, it's not just that the  
10 Federal system finds itself in possession and custody  
11 of these people, but the Federal -- what Congress  
12 could reasonably find is that the Federal Government  
13 knows that there's nobody else to take appropriate  
14 custody and care and that the reason that there's  
15 nobody else to take appropriate custody and care has  
16 to do with the Federal action itself.

17 JUSTICE GINSBURG: So, is the prisoner --

18 CHIEF JUSTICE ROBERTS: So, if there were --

19 JUSTICE GINSBURG: Is it -- is it a prisoner  
20 who has served his time in, say, a Federal  
21 penitentiary in Ohio but is a domiciliary of Arizona,  
22 what happens when the prisoner is released, say, after  
23 10 years? Released to Ohio, sent back to Arizona?  
24 What?

25 GENERAL KAGAN: The default position is that



1 the prisoner is released to the place where the  
2 prisoner was convicted. Now, that -- the prisoner may  
3 or may not have any relationship with that State. The  
4 person may have lived there, may not have lived there.

5 The -- the Federal prison system does  
6 sometimes make other arrangements. The idea behind  
7 any release is to try to make sure that the person is  
8 released to the place where a -- a future lawful life  
9 will be most likely. But in many of these cases, the  
10 prisoner ends up being released to a State that has no  
11 current relationship with the -- with the prisoner,  
12 sometimes has had -- never had any relationship with  
13 the prisoner, and at any rate doesn't now, because the  
14 period of Federal custody has disrupted that  
15 relationship.

16 And what the Federal Government is doing  
17 here is essentially to deal with this transition  
18 problem to make -- to make sure these people don't  
19 fall between the -- the cracks, and to ensure that  
20 where there is a sexually violent and mentally ill  
21 person who one has reason to believe will commit  
22 further offenses, that appropriate care and custody of  
23 those people is ensured.

24 Now, this is no different from what Congress  
25 has done on other occasions as well. This is not the

1 first such Federal civil commitment statute. This is  
2 not a newfangled thing. Section 4248 is identical  
3 in -- in all relevant constitutional respects to  
4 section 4246, which is the general civil commitment  
5 statute for mentally ill, dangerous people generally,  
6 not with any sexual --

7 CHIEF JUSTICE ROBERTS: But, General --

8 GENERAL KAGAN: -- component to it.

9 CHIEF JUSTICE ROBERTS: I understood you in  
10 your response to Justice Alito to say, if I remember,  
11 that it was not just the fact of Federal custody, but  
12 the fact that there are no States or there may well  
13 often be no States willing. What if every State is  
14 willing; I mean, every State is willing to take the  
15 people on out of a concern to protect their citizens.  
16 Does that somehow mean there's no necessary and proper  
17 power?

18 GENERAL KAGAN: I think when we are dealing  
19 with the Necessary and Proper Clause, we are asking  
20 ourselves whether Congress reasonably acted in a given  
21 situation --

22 CHIEF JUSTICE ROBERTS: I guess it wouldn't  
23 be necessary, is what you are saying?

24 GENERAL KAGAN: Well, if -- if -- that's  
25 exactly right, that if the facts before Congress were

1 such that there were no difficulty with this  
2 transition period and that nobody ever fell between  
3 the cracks, an entirely different question would be  
4 presented, and then there would be some kind of  
5 argument that at that point, in those circumstances  
6 State police power would be the appropriate default  
7 position. But --

8 JUSTICE SCALIA: General Kagan, I -- I find  
9 it difficult to believe that if the Federal Bureau of  
10 Prisons wrote the governor of the State into which  
11 this person is to be released, and they try to release  
12 him in the State where he -- he will in the future  
13 reside, and said, we are about to release this person  
14 in 60 days or whatever, in our view there are serious  
15 mental problems, and we think the State ought to  
16 consider commitment proceedings, I find it difficult  
17 to believe that an elected governor or an elected  
18 attorney general would ignore that letter.

19 GENERAL KAGAN: I do believe, Justice  
20 Scalia, that Congress reasonably could have found that  
21 there were difficulties in making this transition.  
22 The cost of commitment of these people is very high,  
23 much higher than standard incarceration. I believe  
24 the States say in their amicus brief that it's some  
25 \$65,000 a year per person per year, and -- and the

1 State may feel as though it shouldn't have  
2 responsibility over this person --

3 JUSTICE SCALIA: The governor is going to  
4 say that at the next election: It would have cost too  
5 much to put this guy up.

6 GENERAL KAGAN: Well, I think people --  
7 people judgments --

8 JUSTICE SCALIA: You know, it costs \$65,000.

9 GENERAL KAGAN: People make judgments all  
10 the time. And I think there's -- there's no evidence  
11 to suggest that Congress was not acting reasonably in  
12 understanding this as a significant problem. And --

13 JUSTICE GINSBURG: Was it -- was that a  
14 consideration? You mentioned that this originated,  
15 4246, with a -- with a committee of judges who said,  
16 we have a problem. Did they --

17 GENERAL KAGAN: That is exactly right,  
18 Justice Ginsburg, and maybe that's the -- the best  
19 answer to Justice Scalia, is history, and it's history  
20 on two separate occasions, which this Court has noted.

21 It's history when -- when this committee of  
22 Federal judges chaired by Calvert Magruder, including  
23 Learned Hand, said we have a real problem here with  
24 people being let go out of the Federal system and the  
25 States not stepping forward and taking responsibility

1 for them. And the Court confronted and -- and thought  
2 about the exact same problem when Congress passed in  
3 1984 section 4243, which is the civil commitment  
4 statute that applies to insanity acquittees, people  
5 who are acquitted on the basis of insanity.

6 And this Court in Shannon said that, I think  
7 the -- the language is, "Federal courts decried time  
8 and again the gaping statutory hole," that is the hole  
9 that -- that existed because people were acquitted on  
10 the basis of insanity and -- and States were not  
11 willing to step forward and take custody of those  
12 people in the way that they would have taken custody  
13 of those people if they had been acquitted of insanity  
14 in the State court systems.

15 JUSTICE SCALIA: I must say I'm -- I'm not  
16 terribly impressed with -- with the argument --

17 GENERAL KAGAN: I can tell, Justice Scalia.

18 JUSTICE SCALIA: -- the States won't do it.

19 (Laughter.)

20 JUSTICE SCALIA: I mean, this -- this is a  
21 recipe for the Federal Government taking over  
22 everything.

23 GENERAL KAGAN: No, I --

24 JUSTICE SCALIA: The States won't do it;  
25 therefore, we have to do it. It has to be done, and

1     therefore the Federal Government steps in and does it.

2                 GENERAL KAGAN:   I don't think so,  
3     Justice Scalia.  I think, in fact, that -- that  
4     Congress on each of these three occasions has limited  
5     the civil commitment power only to people who have  
6     been -- who are in the custody of the Federal  
7     Government and over whom the Federal Government has a  
8     distinctive responsibility.

9                 I will give you an example, Justice Scalia.  
10    I mean, suppose that there was some very contagious  
11    form of drug-resistant tuberculosis that had -- had  
12    become prevalent in the prison system, and States were  
13    not able to deal with that, with quarantining these  
14    people upon their release date, and Congress said:  
15    You know, the best thing to do is to have the Federal  
16    Government act as the appropriate quarantining  
17    authority because we don't think that States are able  
18    to step up and deal with this problem.

19                Would anybody say that the Federal  
20    Government would not have Article I power to effect  
21    that kind of public safety measure?  And the exact  
22    same thing is true here.  This is exactly what  
23    Congress is doing here, is to make sure that mentally  
24    ill, sexually dangerous --

25                JUSTICE KENNEDY:  Well, when I was thinking

1 about your hypothetical, I thought, well, that's a  
2 pretty easy commerce power argument. I -- I notice  
3 that in -- in the government's position, you don't  
4 argue the Commerce Clause very much, and I -- we've  
5 got Morrison v. Brzonkala looking at you and Printz  
6 and so forth.

7 But it -- suppose Congress said there is a  
8 class of committable, dangerous sex offenders that are  
9 crossing State lines and using interstate facilities,  
10 and made those findings. Would that be sufficient to  
11 establish a Federal commitment law?

12 GENERAL KAGAN: Well, as you say, Justice  
13 Kennedy, the government has never argued the Commerce  
14 Clause here in the sense that it has never argued that  
15 these activities have a substantial effect on  
16 interstate commerce, and it hasn't done so because of  
17 the Morrison -- the Morrison precedent.

18 The Commerce Clause I think is relevant in  
19 two ways. It's relevant first because, of course,  
20 it's often the Commerce Clause that gives rise to the  
21 power to criminalize conduct and to punish people for  
22 that conduct. So I think in -- in three of the five  
23 of these cases, the initial power to criminalize the  
24 conduct is based on the Commerce Clause.

25 The Commerce Clause is also relevant here

1 because the Commerce Clause does give rise to a set of  
2 Federal laws having to do with sexual offenses, sexual  
3 solicitation of a minor, sexual exploitation of a  
4 minor when interstate commerce is involved, and when  
5 the Internet is involved. And we do think that that  
6 provides an additional basis, not a sufficient basis,  
7 but an additional basis to -- to approve this law in  
8 the sense that these are the people who are most  
9 likely, really, to violate such Federal laws which are  
10 based on the Commerce Clause in the future.

11 And the reason they are most likely is  
12 because all of them have done it once before, and all  
13 of them have been found to have the kind of mental  
14 illness that makes it --

15 JUSTICE SOTOMAYOR: But that's -- but that's  
16 an easier case, because at least you have an  
17 interstate connection to the offensive conviction and  
18 the ground for future commitment. But these statutes  
19 don't depend on that element being a part of the  
20 commitment process. There's no -- there's no  
21 congressional -- there's no tie to a congressional  
22 power that justifies the commitment other than that  
23 the person is sexually dangerous.

24 GENERAL KAGAN: The -- the essential tie to  
25 a congressional power is the tie of these people to



1 the Federal criminal justice system because they are  
2 in Federal custody.

3 JUSTICE SOTOMAYOR: It's that special  
4 relationship.

5 GENERAL KAGAN: That's -- that's right. And  
6 in addition to that, these are the people who are most  
7 likely to violate Federal laws based on the Commerce  
8 Clause in the future -- most likely to violate such  
9 laws because they have done so in the past and because  
10 they have mental conditions that make it extremely  
11 difficult --

12 JUSTICE STEVENS: But isn't it true that  
13 this statute applies even if a person has not been a  
14 sexual offender in the past?

15 GENERAL KAGAN: It -- it does, Justice  
16 Stevens. There have been 103 --

17 JUSTICE STEVENS: So that argument doesn't  
18 take care of that --

19 GENERAL KAGAN: Just to put some numbers on  
20 the table, there have been 103 people who have been  
21 certified under these laws. Eight under -- under this  
22 law. Eighty-three of them have committed sexual  
23 offenses; 20 --

24 JUSTICE STEVENS: No, but my point is the  
25 law applies to a person who is convicted of armed

1 robbery or bank robbery, and just before the end of  
2 his term in prison the authorities decide he is in  
3 fact a potential sexual offender. They can detain  
4 him.

5 GENERAL KAGAN: Yes, yes, that's right. As  
6 I was saying, 20 of these people fall within that  
7 category, that -- that they are in prison for a  
8 nonsexual offense.

9 JUSTICE STEVENS: Right.

10 GENERAL KAGAN: All of those people have had  
11 prior sexual convictions in their history.

12 JUSTICE STEVENS: But that's not -- that's  
13 not a necessary element of the -- of the statute --  
14 under the statute, is it?

15 GENERAL KAGAN: What is necessary is two  
16 things: First, that the person in fact have engaged  
17 in sexually violent behavior or child molestation. So  
18 there's a factual predicate there. And -- and so far,  
19 the Bureau of Prisons has found that about 15,000  
20 people whom it has reviewed meet that factual  
21 predicate. Of those, the Bureau of Prisons has  
22 certified only 105 of those, who were also found to  
23 have the kind of mental illness that made it  
24 reasonably likely that -- that they would continue to  
25 commit this -- these kinds of offenses.

1 JUSTICE SCALIA: What about release from the  
2 Army? Would that -- would that also -- if I want to  
3 turn this -- this person after discharge at -- you  
4 know, loose upon the society, could the Federal  
5 Government commit that person?

6 GENERAL KAGAN: Mr. Chief -- excuse me,  
7 Justice Scalia -- I didn't mean to promote you quite  
8 so quickly.

9 (Laughter.)

10 CHIEF JUSTICE ROBERTS: Thanks for thinking  
11 it was a promotion.

12 (Laughter.)

13 JUSTICE SCALIA: And I'm sure you didn't.

14 (Laughter.)

15 GENERAL KAGAN: Justice Scalia, I -- I do  
16 think that the military has special responsibilities  
17 with respect to those people in it. In general, I  
18 would say that the relationship between a prisoner and  
19 a -- and a jailer is more comprehensive than any other  
20 kind of relationship that one can name.

21 But I do think that the military  
22 relationship approaches that. And in the military, I  
23 think the military indeed would take this kind of --  
24 these kinds of facts extremely seriously, probably  
25 would commit such a person and -- and try very hard to

1 transfer that person eventually to State custody.

2 If I can reserve the balance of my time.

3 CHIEF JUSTICE ROBERTS: Thank you, General.

4 Mr. DuBois. Is it "due-BWAH" or --

5 MR. DUBOIS: It is, Your Honor.

6 CHIEF JUSTICE ROBERTS: Mr. DuBois.

7 ORAL ARGUMENT OF G. ALAN DUBOIS

8 ON BEHALF OF THE RESPONDENTS

9 MR. DUBOIS: Mr. Chief Justice, and may it  
10 please the Court:

11 I really think the government gives the game  
12 away a bit in its opening statement when it  
13 characterized this law as a law that was necessary to  
14 prevent the problem of releasing sexually dangerous  
15 individuals. And I don't think that that is what the  
16 Necessary and Proper Clause is designed to do.

17 The power to enforce the law which brought  
18 the defendants into Federal custody in the first place  
19 has been exhausted. The defendant has been tried and  
20 convicted, and he's sentenced and he's served his  
21 sentence. That law has been fully vindicated. At  
22 that point, any further detention must stand on an  
23 independent constitutional footing. It cannot --

24 JUSTICE GINSBURG: Do you -- Mr. DuBois, do  
25 you take that same position with respect to not guilty

1 by reason of insanity? Someone is convicted, say, in  
2 the District of Columbia -- say, John Hinckley is  
3 found by the jury to be not guilty by reason of  
4 insanity, must he then be allowed out of Federal  
5 custody, and it depends if his home State or any other  
6 State wants to pick him up?

7 MR. DUBOIS: No, Justice Ginsburg. I think  
8 not guilty by reason of insanity is a -- is a  
9 different case for a couple of reasons. First off,  
10 the commitment that flows from a not guilty by reason  
11 of insanity verdict is directly linked to the Federal  
12 law which brought you into custody in the first place.  
13 The person is found to be -- to have been committed  
14 the crime, but he is only -- he is only excused from  
15 punishment for that crime by basis of his mental  
16 illness. So there's a direct link between the -- the  
17 crime which brought you into Federal custody and your  
18 subsequent commitment.

19 The other distinction, of course, is that  
20 not guilty by reason of insanity must be pled by the  
21 defendant, and in some sense the commitment is in lieu  
22 of punishment; it's not an additional punishment  
23 tacked on at the end of the sentence. So I don't  
24 think that the infirmities of 4248 are at play at all  
25 in --

1 JUSTICE GINSBURG: And so what's the power  
2 that the Federal Government is exercising when it  
3 commits someone who has been found not guilty by  
4 reason of insanity?

5 MR. DUBOIS: They are vindicating their  
6 interest in the specific criminal law which brought  
7 the individual into custody, which presumably in most  
8 cases -- in all cases, I guess -- is supported by an  
9 enumerated power. It is -- as I say, the commitment  
10 is -- is a substitute for punishment, it's in lieu of  
11 punishment, but it's directly linked to the crime  
12 which brought the individual into Federal custody.

13 JUSTICE STEVENS: Mr. DuBois, what is your  
14 answer to the hypothetical that General Kagan posited?  
15 Supposing after a man has been sentenced, say, to  
16 30 days for gun possession, 20 -- 10 days before he is  
17 to be released, it's determined he has a communicable  
18 disease -- he would spread a disease if he gets out.  
19 Could the -- could the Federal Government have the  
20 power to detain him at the end of the 30 days?

21 MR. DUBOIS: Well, Your Honor, I think a  
22 single individual with a single communicable disease,  
23 a defendant with tuberculosis --

24 JUSTICE STEVENS: Right.

25 MR. DUBOIS: -- or something of that nature,

1 I don't think would -- would call for that type of --  
2 of Federal Government --

3 JUSTICE STEVENS: It may not call for it.

4 My question is would it have the power --

5 MR. DUBOIS: I would say --

6 JUSTICE STEVENS: -- not to release him,  
7 because there -- there's strong evidence that, as soon  
8 as he gets into the society, the disease will -- will  
9 pass to others?

10 MR. DUBOIS: Well, Your Honor, I would say  
11 that, in the same way that mental health is a uniquely  
12 State function, so too is public health. And we would  
13 say that, no, the Federal Government cannot detain  
14 that person past the end of his sentence, and that --

15 JUSTICE SCALIA: We -- we have a Federal  
16 agency that's -- that deals with communicable  
17 diseases. It's part of the National Institute of  
18 Health, I believe. Is that agency ultra vires? I  
19 mean, aren't communicable -- I mean, if anything  
20 relates to interstate commerce, it's communicable  
21 diseases, it seems to me.

22 MR. DUBOIS: I was about to say, Your Honor,  
23 you know, that's the -- that's the other I think  
24 significant difference that Justice Kennedy pointed  
25 out, that there is a clear hook to interstate commerce

1    when we are talking about communicable diseases, and  
2    that hook is simply not present.

3               JUSTICE BREYER:  Well, why -- why not?  I  
4    mean, is there anything to prevent the United States  
5    Government to say:  Mental illness is serious problem  
6    in the United States, and we feel the States sometimes  
7    do a good job, sometimes they don't, but we want to  
8    set up a group of Federal mental hospitals and  
9    treatment centers of the most modern kind, and in  
10   these circumstances, there will be a handful of people  
11   who pose a threat to themselves or others, in which  
12   case they must be restrained.

13              There might be due process problems, whether  
14   you have the right person, whether they should be  
15   restrained, et cetera.  But doesn't the Constitution  
16   give authority to the Federal Government to set up a  
17   system of mental illness prevention and cure, if in  
18   fact they determine that that's a desirable use of  
19   Federal money?

20              MR. DUBOIS:  No, Justice Breyer, I don't  
21   think the Federal Government has that power.

22              JUSTICE BREYER:  It doesn't have the power  
23   to set up hospitals?

24              MR. DUBOIS:  It doesn't have the power to  
25   detain individuals as a result of their mental illness



1 based on the fear that they are going to go out and  
2 commit a crime.

3 JUSTICE BREYER: In other words, if the  
4 doctors were to say, there are a thousand people here  
5 suffering from mental illness, your own daughter or  
6 mine or someone has a -- is threatening suicide or  
7 threatening murder? There are lots of real cases like  
8 that, where people have terrible times, and there are  
9 not adequate State facilities. And were the Federal  
10 Government to say, this is a problem that we wish to  
11 go into and help with, you are saying the Constitution  
12 prohibits that? Where does it prohibit it?

13 MR. DUBOIS: Well, I think -- I think that  
14 would not be a very large extension, if it's an  
15 extension at all, of the holding in Morrison, that the  
16 Federal Government could not do that.

17 JUSTICE SCALIA: Try the Tenth Amendment.

18 MR. DUBOIS: Or the Tenth Amendment, Your  
19 Honor. And --

20 JUSTICE ALITO: But do you -- do you think  
21 that the Congress has the power to remedy problems  
22 that are caused by the operation of the Federal prison  
23 system, caused by incarceration?

24 MR. DUBOIS: That would certainly not be the  
25 case here, Your Honor. All of these individuals --

1   there is no claim that these individuals became  
2   mentally ill while in the custody of the Bureau of  
3   Prisons.  These are all, as far as I understand,  
4   illnesses which predate their entry into the  
5   Federal prison --

6               JUSTICE ALITO:  What about the general  
7   proposition that if -- if the incarceration causes a  
8   problem, then the Federal Government has the power,  
9   ancillary to the power to operate the -- the criminal  
10  justice system, to remedy the problems that it has  
11  caused by the incarceration?

12              MR. DUBOIS:  Well, Your Honor, I think they  
13  have a power, but it's not an unlimited power.  That  
14  power is addressed by statute --

15              JUSTICE KENNEDY:  I didn't hear.  You think  
16  they have a power to --

17              MR. DUBOIS:  They have a power, but it's not  
18  an unlimited power.  There is a statute, 4245, which  
19  allows the government to transfer an individual if he  
20  becomes ill while in the custody of the Bureau of  
21  Prisons, to a psychiatric facility for care and  
22  treatment.  Now, by the terms of that statute,  
23  however, that commitment must end at the end of their  
24  sentence, and I think that would be the extent of the  
25  government's power.

1 JUSTICE KENNEDY: Because the government --

2 JUSTICE ALITO: Why as a matter of  
3 constitutional law does it end at that point?

4 MR. DUBOIS: Because at that point, the  
5 government has no live Federal interest. They are --  
6 they have effectuated the power which brought the  
7 person into custody. They have fully vindicated the  
8 -- the criminal law that brought them into -- into the  
9 prisons.

10 JUSTICE KENNEDY: Well, suppose, in Justice  
11 Alito's hypothetical, he caught the communicable  
12 disease in the prison as a result of poor prison  
13 conditions.

14 MR. DUBOIS: Well, and I'm sure stuff like  
15 that does happen, Justice Kennedy, and, again, the  
16 government does, while the person is in the custody of  
17 Bureau of Prisons, is entitled to --

18 JUSTICE KENNEDY: No, no. The hypothetical  
19 is that his sentence ends, and they want to commit him  
20 to a Federal health facility.

21 MR. DUBOIS: Because he has -- he has caught  
22 some disease --

23 JUSTICE KENNEDY: Yes.

24 MR. DUBOIS: -- while in the system? Again,  
25 I think -- first, as a practical matter, I don't think

1 any prisoner would take that deal. They would rather  
2 be treated in the community. So it becomes a question  
3 of whether the person can be held for the safety of  
4 others, and again, I think the answer is no.

5 JUSTICE ALITO: Well, what if the person is  
6 simply injured in prison as a result of, let's say, an  
7 attack by another prisoner, and now the sentence  
8 expires. The Federal Government has no power to set  
9 up hospitals or facilities to care for that person for  
10 the duration of the -- of the injury that's -- that  
11 was caused during the period of incarceration?

12 MR. DUBOIS: Your Honor, I think the Federal  
13 Government would have no power to do that. The --  
14 while the individual is in the custody of the Bureau  
15 of Prisons, the Federal Government does have a limited  
16 parens patriae power to see to their care and  
17 treatment.

18 Now, I think we are getting a little bit far  
19 afield from the, you know, indefinite, potential  
20 lifetime detention at issue here and whether, under  
21 doctor's orders, the -- tells the person, well, you  
22 ought to stay in the hospital for an extra week so  
23 that this leg sets properly -- you know, something of  
24 that limited duration, perhaps, might be a good --

25 JUSTICE BREYER: Well, once you're down that

1 road -- I was rather surprised, but not too surprised,  
2 that, I think perhaps with prompting, I heard you say,  
3 I think, that the Tenth Amendment would prohibit the  
4 Federal Government from setting up a system of mental  
5 care, which you'd better tell the people across the  
6 street, if that's your view.

7 The -- the -- is that what you are actually  
8 saying?

9 MR. DUBOIS: That the Federal Government  
10 cannot set up a system of --

11 JUSTICE BREYER: Of national mental care for  
12 mentally ill people.

13 MR. DUBOIS: Well, again, that would have to  
14 --

15 JUSTICE BREYER: Because you either think  
16 that the Constitution prohibits that or you think it  
17 permits it.

18 MR. DUBOIS: Well, I think it would have to  
19 relate to an enumerated power, and it would have to  
20 be --

21 JUSTICE BREYER: Yes, probably the Commerce  
22 Clause power.

23 MR. DUBOIS: -- in furtherance of an  
24 enumerates power.

25 JUSTICE BREYER: So it's fine --

1 JUSTICE SCALIA: No, no.

2 (Laughter.)

3 JUSTICE SCALIA: The government can spend  
4 money on whatever it wants. That's the spending  
5 power. They can set up hospitals. The issue is  
6 whether they can force somebody into a hospital, not  
7 whether they can set up hospitals.

8 I was going to ask you to tell us why the  
9 sky will not fall if we -- if we go the way you would  
10 like us to. I assume that if the problem is that the  
11 States are unwilling to incur the expenses for these  
12 people, that Congress could pass a statute saying the  
13 Federal Government will pay the expenses of any  
14 prisoners released from Federal prison.

15 MR. DUBOIS: Absolutely, Your Honor.

16 JUSTICE SCALIA: And it seems to me that  
17 statute, combined with a letter to the elected  
18 governor, who probably wants to be re-elected, or the  
19 elected attorney general, will make it pretty certain  
20 that the State will take over the responsibility for  
21 the individual.

22 MR. DUBOIS: Well, that's absolutely  
23 correct, Your Honor, and that -- and that option,  
24 which we -- we definitely believe is the best option  
25 --

1 JUSTICE STEVENS: But, of course, that goes  
2 to -- that goes to the question of the wisdom of the  
3 statute. I think, as the case comes to us, we have to  
4 assume that there are cases out there in which there  
5 will be no solution such as the one Justice Scalia  
6 proposes.

7 MR. DUBOIS: Well, I don't know --

8 JUSTICE STEVENS: I think that's why  
9 Congress acted, because they think there are such  
10 cases.

11 MR. DUBOIS: Well, I don't know that you can  
12 make that assumption, and to the extent that the --  
13 the fear is that the State will decline  
14 responsibility, I do not think that Federal power can  
15 expand or contract based on a State's willingness or  
16 unwillingness to accept a responsibility --

17 JUSTICE STEVENS: But we are asked to decide  
18 a question on the assumption that there are States and  
19 there are governors who will not react to the problem  
20 of particular prisoners who are released in Arizona or  
21 some place when they originally came from Michigan or  
22 whatever it is. I think we have to assume that there  
23 are cases in which the statute would -- would play a  
24 role.

25 MR. DUBOIS: Well, Your Honor -- Your Honor,

1 I think that may be right, but there -- but there  
2 are -- the question is: What's a constitutional  
3 response to that problem? We can imagine plenty of  
4 unconstitutional responses. For instance, a person --

5 JUSTICE STEVENS: Absolutely, and that's why  
6 it seems to me that the constitutional answer is the  
7 same in this statute as in the case of somebody who  
8 incurs a very communicable disease and the government  
9 wants to prevent him from infecting the community.  
10 Why is it a different constitutional question?

11 MR. DUBOIS: Well, I think the different  
12 constitutional question is -- again, I do not believe  
13 the Federal government has a general quarantine power  
14 that doesn't -- that would allow it to hold prisoners  
15 past their release date.

16 I think that is a public health problem,  
17 except for -- to the extent that there may be a closer  
18 nexus to a forward-looking Commerce Clause hook that  
19 doesn't in this case. The government's argument is  
20 purely backwards looking. They -- they locate the  
21 power to commit --

22 JUSTICE STEVENS: I understand. It's purely  
23 backwards looking, and it takes care of the case that  
24 -- the premise of the government's argument is that  
25 the release itself is a Federal act that has to be



1 done responsibly, and the very release, if it causes  
2 harm to the community, can be prevented.

3 MR. DUBOIS: And it seems to me that the  
4 government's argument essentially collapses into the  
5 notion, well, if it's a good idea, it must be  
6 necessary and proper to do it. I think that's just  
7 simply not correct. It's very -- we're going --

8 JUSTICE GINSBURG: It's more than the  
9 question of good idea. You're talking about  
10 endangering the health and safety of people, so it's  
11 --

12 MR. DUBOIS: Well, there --

13 JUSTICE GINSBURG: The government has some  
14 responsibility, doesn't it?

15 MR. DUBOIS: Absolutely, the government --  
16 the government has a responsibility, but they have  
17 certain constitutional limits that also must be  
18 respected. So the statute --

19 JUSTICE GINSBURG: Yes, but you say, if the  
20 State is unwilling to take the person, and apparently,  
21 that is the problem that precipitated 4246 and, now,  
22 4248, and that -- you -- the Federal government is  
23 just helpless short of passing a spending measure and  
24 saying, State, if you do this, we'll give you the  
25 money.

1           MR. DUBOIS: Right. And -- and -- well, I  
2 think there's -- there's a number of weapons in the  
3 Federal Government's arsenal. First of all, there's  
4 the Federal spending power. Second of all, there is  
5 already, in the statute of 4042, a specific duty to  
6 warn, just as Justice Scalia was positing. It already  
7 exists.

8           Any time the Federal Government is going to  
9 release a person they believe to be violent or  
10 dangerous, they are required to warn the attorney  
11 general of the State within a certain period of time  
12 before their release.

13           At that point, I do believe it becomes a  
14 problem of the State polity. If the State governor is  
15 going to be cavalier about that type of release, then  
16 I think the answer for that lies in the voters of that  
17 State, to say, no, we want you to take this problem  
18 seriously and --

19           CHIEF JUSTICE ROBERTS: Well, he's not going  
20 to be cavalier. He doesn't have -- he's going to say:  
21 Don't do it. This is a dangerous person, the Federal  
22 government; don't release him.

23           MR. DUBOIS: And he's going to --

24           CHIEF JUSTICE ROBERTS: And you want the  
25 Federal Government to have to be in the position of

1 saying, well, we have to.

2 MR. DUBOIS: Exactly. The Federal  
3 Government has to, and at that point, the State must  
4 make the hard political decision. Do we want to take  
5 this person on, spend the money necessary to --

6 CHIEF JUSTICE ROBERTS: Well, it may be the  
7 Federal Government's hard political position. They  
8 are the person holding them, and the attorney general  
9 is saying, don't release him, and then the Federal  
10 government is going to make the decision, well, we  
11 have to.

12 MR. DUBOIS: And so, in that sense, it's no  
13 decision at all because the Constitution requires that  
14 they be released.

15 JUSTICE BREYER: The -- go back once more  
16 because I am obviously getting nowhere with this, but  
17 I thought that, if you set up a set of hospitals, as I  
18 think the government could do, there will be a few  
19 people, sometimes, who have to be restrained in those  
20 hospitals for themselves or other's benefit.

21 If you set up a system of mental hospitals,  
22 that's even more true. If you set up a university,  
23 some people will be sick, and they will be in the  
24 infirmary, and occasionally, you will come across a  
25 person who has to be restrained, et cetera.

1           Now, once you are down the road where you  
2   admit the government can do that, how is a prison any  
3   different?

4           MR. DUBOIS:   Well, I --

5           JUSTICE BREYER:   You set up a prison where,  
6   in fact, occasionally, people have to be restrained  
7   for health reasons, et cetera, and just as in the  
8   other cases, sometimes that can last past the normal  
9   release date, so can it in prison.

10          Maybe there's a better way, but why isn't  
11   this just a normal part of running this institution,  
12   just as it is in the other cases?

13          MR. DUBOIS:   Well, we'll just start -- I  
14   think, a couple of responses.   First of all, this is  
15   -- that is no part of the government's argument in  
16   this case.   Their -- their argument is a  
17   backward-looking argument that locates its power in  
18   the fact that they have had these people in their  
19   custody, and they can't responsibly let them go.

20          What you are positing is more of a  
21   forward-looking argument that would essentially create  
22   a Federal parens patriae power, that the Federal  
23   government has --

24          JUSTICE BREYER:   No, I'm not, actually.   I'm  
25   just showing you the connection between running an

1 institution, which, for whatever set of reasons in the  
2 Constitution, you have the authority to do, and then  
3 it becomes, as part of that institution, part of the  
4 job to take care of people in a certain way.

5 Sometimes that requires a restraint, and  
6 sometimes that restraint could last beyond the period  
7 where in the absence of that need the person would no  
8 longer be part of the institution. That's true of a  
9 hospital, of a mental hospital, and of a prison.  
10 Whether they rest on the same power or a different  
11 power, the government has the power, Federal, to  
12 establish all of those institutions.

13 I'm just drawing institutional connections.  
14 That's -- that's what I'm saying. Maybe that's an  
15 unnecessarily complex argument, but I was just seeing  
16 it that way.

17 MR. DUBOIS: Well, it -- it is complex,  
18 Justice Breyer, and it's also, I think,  
19 historically -- the Federal Government has not  
20 historically thought to have been able to have the  
21 sort of general parens patriae power that -- that the  
22 States do enjoy to take care of the health and  
23 well-being of its citizens. I think it would be quite  
24 a step for the Federal Government to embark on an  
25 enterprise of that nature.

1 JUSTICE SCALIA: Don't -- don't' States have  
2 involuntary commitment procedures?

3 MR. DUBOIS: Every State does, Your Honor.

4 JUSTICE SCALIA: Now, couldn't the Federal  
5 Government fund a Federal -- would you find a  
6 constitutional problem in the Federal Government  
7 funding an office which brings involuntary commitment  
8 proceedings in a State where a prisoner is released  
9 when the Federal Government believes --

10 MR. DUBOIS: There would have --

11 JUSTICE SCALIA: -- the prisoner is unsafe?

12 MR. DUBOIS: There would be absolutely no  
13 problem with that, Your Honor. The Congress, with  
14 spending power, would have clear ability to fund that  
15 type of program run -- run and administered by the  
16 States.

17 JUSTICE SCALIA: And I presume the State  
18 couldn't -- if the -- if the Court says commitment is  
19 proper, the State would have to accept the commitment,  
20 no?

21 MR. DUBOIS: Yes, absolutely, Your Honor.

22 JUSTICE SCALIA: So why don't they do that?

23 MR. DUBOIS: They should do that. I mean,  
24 what they are doing here is what they can't do. Just  
25 --

1 JUSTICE STEVENS: I guess we can all think  
2 of a lot of different statutes Congress might be  
3 enacted. We have to decide whether this one is  
4 constitutional.

5 MR. DUBOIS: And, Your Honor, I think that's  
6 absolutely right.

7 JUSTICE SCALIA: Yes, but most of the  
8 argument for why this is constitutional is simply it's  
9 necessary, and therefore it's constitutional. But I'm  
10 not even sure it's necessary.

11 MR. DUBOIS: Well, I think that's right,  
12 Your Honor.

13 And to answer your question, Justice  
14 Stevens, you are absolutely right. And I think there  
15 -- there are many tools that Congress has at its  
16 disposal to address this problem. The spending power  
17 is one. Every one of these individuals would be on  
18 Federal supervised release.

19 JUSTICE GINSBURG: Yes, that's one of the  
20 things that you mention in your brief. You said you  
21 could vary the conditions of supervised release, but  
22 you were not at all specific about that. You said the  
23 Federal Government -- the person has gotten out, they  
24 know the person is dangerous, so what -- what are the  
25 measures that they would take to do what you said in

1 the brief the Federal Government could do; that is,  
2 set the terms of supervised release in order to  
3 account for sexual dangerousness?

4 MR. DUBOIS: Well, the first thing they can  
5 do is act as a liaison between the individual and the  
6 State. Every one of these individuals will have a  
7 Federal probation officer who will be responsible for  
8 their supervision during the period of supervised  
9 release. They also have the ability to go back to the  
10 court of conviction and seek modifications of the  
11 terms of supervised release, that they have certain  
12 concerns --

13 JUSTICE GINSBURG: Well, what would the  
14 modification be?

15 MR. DUBOIS: Those modifications could  
16 include things like mandating mental health treatment  
17 during the term of supervised release, certain  
18 limitations on travel, certain limitations on  
19 activities with computers. A fairly large range of --

20 JUSTICE SOTOMAYOR: But that doesn't take  
21 care of the fact that the prisoner would be released  
22 before there was a cure found for the alleged mental  
23 illness, meaning supervised release generally has a  
24 term limit.

25 MR. DUBOIS: That's correct, Your Honor.



1 And I think that concern, the -- the fact that we want  
2 to do something before the release is addressed by  
3 4042, which is the duty to warn statute.

4 JUSTICE SOTOMAYOR: Could -- what would  
5 happen if Congress said, as part of a sentence, a  
6 judge could incorporate a civil commitment finding and  
7 say: You are going to serve X amount in jail and Y  
8 amount, and then we are going to civilly commit you  
9 indefinitely, because as of today, I am finding you a  
10 sexual predator subject to a mental illness.

11 Would that be constitutional, and if not,  
12 why not?

13 MR. DUBOIS: Well, that would not be  
14 constitutional, Justice Sotomayor, because of the  
15 indefinite nature of the commitment. You can envision  
16 a system -- and we had that type of system in the  
17 '50s, '60s, and '70s -- of indeterminate sentencing,  
18 where --

19 JUSTICE SOTOMAYOR: Well, I -- let's assume  
20 it incorporates all the protections of -- of this  
21 statute with respect to periodic review.

22 MR. DUBOIS: So if we have an  
23 indeterminate-type sentence where you -- you get a  
24 sentence of 10 years and you are periodically reviewed  
25 to see if you are safe to be released, of course

1     that's constitutional.

2                 JUSTICE SOTOMAYOR:   So it's constitutional  
3     because it's part of the sentence?

4                 MR. DUBOIS:   That's exactly right, Your  
5     Honor.

6                 JUSTICE SOTOMAYOR:   All right.   Because it's  
7     --

8                 MR. DUBOIS:   It's a part of the sentence.  
9     It's part of the punishment for the crime which  
10    brought you into custody.

11                JUSTICE SOTOMAYOR:   Well, so that would be  
12    true whether or not you were convicted of a sex crime  
13    or a tax crime or any other crime, so long as the  
14    judge was making a finding that this was necessary to  
15    protect the public?

16                MR. DUBOIS:   Sure.   A judge -- whether you  
17    are being sentenced for bank robbery or -- or some  
18    sort of sexual offense, the judge can take into  
19    account the whole of your criminal history in  
20    determining what you are being sentenced for, but you  
21    are still only being sentenced for the crime for which  
22    you are convicted.   And that would be cabined by the  
23    varying statutory maxes for each specific offense.

24                JUSTICE SOTOMAYOR:   All right --

25                MR. DUBOIS:   That's why in this case it's --

1 JUSTICE SOTOMAYOR: But what you're saying  
2 is, then, that the nexus is -- the nexus with the need  
3 for the criminal justice system or the proper and  
4 necessary power to address this problem ends at the  
5 point of sentencing, is what you're saying?

6 MR. DUBOIS: That's correct, Your Honor. At  
7 that point the enumerated power which supported the  
8 crime has been fully effectuated. It has been  
9 exhausted. There is no further backward-looking  
10 Federal power to be vindicated under Article I.

11 Now, there may be a forward-looking power.  
12 If there is one, the government hasn't identified it.  
13 But that's where the constitutional justification  
14 would have to be found in this case.

15 JUSTICE SOTOMAYOR: Well, it says that it  
16 exists as a result of its control over this  
17 individual, its special relationship, and the fact  
18 that at the end of the sentence, it has an obligation  
19 to the public.

20 MR. DUBOIS: And -- and that really is, I  
21 think, historically, sort of an anomalous argument in  
22 the sense that civil commitment has never been thought  
23 to be part of the criminal justice system. They are  
24 two separate spheres of government control and  
25 government authority. And while they may intersect at

1 the State level, a State doesn't civilly commit its  
2 citizens based on the fact that it's running a prison  
3 system or the fact that it has them in custody. It  
4 commits these people based on their parens patriae and  
5 general police powers.

6 JUSTICE GINSBURG: What about someone who is  
7 incompetent to stand trial? I take it you think that  
8 that's a perfectly proper application of 4246?

9 MR. DUBOIS: I believe that is correct. I  
10 think under Greenwood that type of commitment is  
11 appropriate.

12 JUSTICE GINSBURG: Does it matter that the  
13 person who has been found incompetent to stand trial  
14 has now been in custody for three times longer than  
15 the maximum sentence?

16 MR. DUBOIS: I do not think that that is  
17 constitutionally significant, because -- well, there's  
18 a couple of reasons. But the first reason is, again,  
19 you have a direct link to the unexhausted power. The  
20 power to prosecute still exists, and the government's  
21 interest only isn't the interest in punishment; the  
22 government does have an interest in obtaining a  
23 conviction, which is still alive. And if the person  
24 does restore -- regain competency to the extent that  
25 he can be tried, he can be convicted. Even if he

1 cannot be -- he cannot be punished any further, he  
2 still can be tried and convicted, and the government's  
3 interests can be vindicated.

4 JUSTICE GINSBURG: Even though it may be  
5 purely imaginary; that is, that this particular  
6 person, all of the experts agree, will never be  
7 competent to stand trial.

8 MR. DUBOIS: And I think that was the -- the  
9 logic or the trade-off in Greenwood, which was that we  
10 were not going to require courts to make finely  
11 grained determinations about whether or not this  
12 person or that person might regain competency, and  
13 just decide to have a simpler test that commitment is  
14 appropriate as long as the Federal Government's  
15 interest has not been exhausted or vindicated.

16 JUSTICE ALITO: Could you explain why the  
17 constitutional power that provides the basis for a  
18 Federal criminal conviction is exhausted at the end of  
19 the -- either the maximum term of imprisonment that  
20 Congress chooses to establish when it enacts the  
21 statute or at the end of the particular term that is  
22 given to this prisoner?

23 I understand why it's relevant for statutory  
24 purposes. It may be relevant for other constitutional  
25 purposes -- double jeopardy and due process -- but why

1 as a -- why does the power, the Commerce Clause power,  
2 the power to make rules for Federal property and so  
3 forth, why is that exhausted at the end of the --  
4 either of those two periods? I don't quite understand  
5 that.

6 MR. DUBOIS: Well, I think the reason, Your  
7 Honor, is that at the time of conviction and sentence,  
8 the interest in -- the official regulation of  
9 interstate commerce, say, has been vindicated by this  
10 person's conviction for doing an activity which  
11 Congress has judged to be interfering with interstate  
12 commerce. And that --

13 JUSTICE ALITO: Well, only to the extent  
14 that that's what the statute says. Take whatever the  
15 offense is, would it be a violation of the Necessary  
16 and Proper Clause? Let's say it's a commerce -- it's  
17 based on the Commerce Clause. Would Congress exceed  
18 it's powers under the Commerce Clause if it imposed a  
19 sentence of life imprisonment without the possibility  
20 of parole?

21 I mean it raises other constitutional  
22 questions, but why does it raise a question as to the  
23 extent of the power that's being exercised by -- by  
24 Congress?

25 MR. DUBOIS: Well, Your Honor, I think

1 Congress does have almost unlimited authority to set  
2 statutory maximums for different crimes based on their  
3 estimation of the severity of the crime. I -- I don't  
4 see that that poses a problem. The problem here is  
5 that there is no necessary connection between the --  
6 say, the regulation of interstate commerce and the  
7 desire to prevent primarily local sex offenders. It's  
8 very difficult to say how preventing general, State-  
9 type violent crimes has anything to do with the  
10 regulation of interstate commerce. And that's what  
11 this --

12 JUSTICE KENNEDY: Well, there is -- there is  
13 in the sense that the relation between the prisoner  
14 and his or her State is disrupted for, say, 15 years,  
15 and then this person is just a derelict.

16 MR. DUBOIS: Well, I really think that that  
17 argument raises a bit of a red herring. I have been  
18 practicing as a Federal defender for a very long time.  
19 I have never yet had a defendant where the Bureau of  
20 Prisons didn't know where to send them. And there has  
21 never been a case where a defendant did not have a  
22 State to go to, and --

23 JUSTICE SCALIA: Where do they send them?  
24 The last residence where --

25 MR. DUBOIS: The -- the default is -- as the

1 government indicated, is the court of conviction, the  
2 place of conviction, which is probably about 90  
3 percent of the time their home State, anyway. But if  
4 -- if they are from a different home State, generally  
5 the Bureau of Prisons tries to come up with a release  
6 plan to release them to their State of domicile. And  
7 --

8 JUSTICE STEVENS: I want to follow up on  
9 Justice Alito's question. Supposing Congress passed a  
10 statute that said at the expiration of every sentence,  
11 the prisoner shall be examined for certain reasons, and  
12 if he fails certain tests, he shall not be released  
13 for another 30 days. Say he should be examined to  
14 determine whether he is a sexual predator. And that's  
15 in every -- every sentence at the time of the  
16 sentence?

17 MR. DUBOIS: And every -- and then,  
18 following that examination, they could be then  
19 detained indefinitely?

20 JUSTICE STEVENS: Right. And it says so in  
21 the statute.

22 MR. DUBOIS: I do not think that that would  
23 be constitutional, Your Honor, because it still would  
24 have to be part of the punishment for the crime.  
25 Civil commitment is a civil --



1 JUSTICE STEVENS: One of the elements of the  
2 punishment is that you are subjected to this  
3 examination that otherwise you wouldn't have to take.  
4 It seems to me maybe your case boils down to the fact  
5 that -- that Congress hasn't written the right  
6 statute.

7 MR. DUBOIS: We do not know that this  
8 statute cannot be written constitutionally. All we  
9 know is this statute is not written constitutionally,  
10 because it is effectively unlimited. It effectively  
11 does require no connection between the underlying  
12 criminal charge and the subsequent commitment. You  
13 can be in custody for any crime whatsoever. It  
14 doesn't have to be sex-related. You can never have  
15 been convicted of a sex offense whatsoever.

16 So it really is -- there's almost a complete  
17 de-linking of the crime which brought you into Federal  
18 custody and your subsequent commitment. Can we  
19 imagine hypotheticals that -- that create a link, that  
20 rolls it into the punishment? Perhaps, but that's not  
21 this statute, and this statute must fail for that  
22 reason.

23 If there's no further questions, Your Honor,  
24 I thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, Mr.

1 DuBois.

2 General Kagan, you have 3 minutes remaining.

3 REBUTTAL ARGUMENT OF GEN. ELENA KAGAN

4 ON BEHALF OF THE PETITIONER

5 GENERAL KAGAN: Thank you,

6 Mr. Chief Justice.

7 What Congress said here was something pretty  
8 simple and very reasonable. It said if we, the  
9 Federal Government, have somebody in our custody, and  
10 we know that that person has the kind of mental  
11 illness that's going to cause grave danger to the  
12 community, and we know that there is no one else who  
13 is in a good position to prevent it, and we know that  
14 we are in part responsible for that vacuum, then we  
15 should be able to do something about it. That's what  
16 section 4248 says, and section 4248 is constitutional  
17 for that reason.

18 Justice Scalia has several times suggested  
19 that maybe there is no experience of this, but I think  
20 that the facts of the Judicial Conference Committee  
21 report, stating that there were these problems with  
22 respect to mentally ill people generally, rebuts that.  
23 So, too, this Court's view in Shannon, that section  
24 4243 was necessary because there was a gaping  
25 statutory hole where States were not willing to step

1 forward, rebuts that as well.

2 In fact, it is not and has never been the  
3 case that the test here is whether a government action  
4 is absolutely necessary to aid or effect a  
5 governmental or congressional power. The wisdom of  
6 the statute here is not what's at issue: Maybe this  
7 is the right statute; maybe there might be a better  
8 one. The only question is the constitutionality of  
9 the statute. That sort of wisdom, whether there might  
10 be a better statute, that's for Congress to decide.

11 Thank you, Mr. Chief Justice.

12 CHIEF JUSTICE ROBERTS: Thank you, General.

13 Thank you, counsel.

14 The case is submitted.

15 (Whereupon, at 11:04 a.m., the case in the  
16 above-entitled matter was submitted.)

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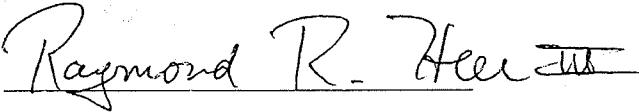
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of UNITED STATES, Petitioner, v. GRAYDON EARL COMSTOCK, JR., ET AL.; and that these attached pages constitute the original transcript of the proceedings for the records of the Court.

Raymond R. Heer 

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